United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-7121

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 75-7121

B
P/S

MIRIAM WINTERS,

Plaintiff-Appellant,

-against-

ALAN D. MILLER, M.D., individually and as Commissioner of Mental Hygiene of the State of New York;
ALEXANDER THOMAS, M.D., individually and as Director of the Psychiatric Division, Bellevue Hospital Center;
FRANCIS J. O'NEILL, M.D., individually and as Director of Central Islip State Hospital;
Doctors H. BLANKFELD, DUSAN KOSOVIC, SANDRA GRANT, GERALD GRANT, GERALD COLLINS, CHRISTINE JORDAN, THOMAS DACORTA and CATHERINE DROMGOOLE and other doctors on the staffs of Bellevue Hospital and Central Islip State Hospital whose names are unknown to plaintiff,

Defendants-Appellees.

UNITED STATES COURT OF APPEALS
FILED
MAY 8 1975
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SECOND CIRCUIT

REPLY BRIEF FOR APPELLANT

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INTRODUCTION

The answering briefs of defendant Miller ("State's brief") and of defendants Thomas and Ollins ("City's brief") should be noted for what they do not assert:

(a) They suggest no rationale for the order below that is in any way related to the subject of the FRCP Rule 60(b) motion, namely whether counsel's failure to appear for trial was cause for dismissal.[1/] They apparently concede that plaintiff demonstrated mistake, inadvertance or excusable neglect to the satisfaction of the district court.

(b) They argue that plaintiff's failure to present proof on the merits was cause for denial of the motion[2/] but they do not explain how, if so, the motion to reopen could have been granted as to other defendants since plaintiff's factual showing was limited to counsel's

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1/ Defendant Miller contends that counsel's refusal to proceed in the absence of deposition transcripts, rather than his failure to appear, was the grounds for the dismissal (State's brief, p. 4). True or not, the issue before the district court was still counsel's behavior, not the merits of the case which, as a preliminary matter, had already passed muster. Winters v. Miller, 446 F.2d 65, (2d Cir. 1971) cert denied 404 U.S. 984 (1971).

2/ Discussed infra at Point I; see City's brief, p. 9; State's brief, p. 7.

failure to appear (5A-7A).[3]

(c) In view of the immunity and good faith defenses they assert,[4] they do not explain how the district court could have distinguished between, e.g., Dr. Miller and Dr. O'Neill, the Director of Central Islip, neither of whom, from the record, knew or treated the patient personally and both of whom might raise the same defenses.

(d) They fail to explain why the defendants did not oppose the motion to re-open or assert their defenses at that time.

(e) They offer no indication that any prejudice would inure to these defendants if the case were re-opened in its entirety.

In short, the answering briefs fail to rebut appellant's principal contention, that the district court acted arbitrarily in the context below in refusing to re-open the action as to some defendants but not as to others.

On the other hand, the State's brief devotes considerable attention to countering arguments which were never advanced by the plaintiff-appellant, such as the notion that Dr. Miller's liability be predicated

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3/ Reference is to pages of the appendix. The factual record was unchanged from the time that the case was remanded for trial by this Court (446 F.2d 65).

4/ Discussed infra at Points II and III.

upon his status alone or upon the doctrine of respondeat superior (pp. 9, 9A, 13), and the effect of a denial of certiorari (pp. 9, 9A, 10). The City's brief, meanwhile, suggests the rather startling defense that Dr. Ollins may not have been served with a summons and complaint (pp. 2, 13), despite the fact that the Corporation Counsel served an answer on his behalf in May, 1974. (See Docket Entry No. 48 of Record on Appeal and FRCP Rule 12(h).)

I. ABUSE OF DISCRETION

The defendants-appellees apparently concede that plaintiff did demonstrate "mistake, inadvertance and excusable neglect" to the satisfaction of the district court. However, they assert that she failed to satisfy an additional requirement under Rule 60(b)(1), that she demonstrate that she has a meritorious claim (City's brief, p. 9, State's brief, p. 7). They forget, however, that by the eve of trial the plaintiff has already established a substantial record and has already made a preliminary demonstration on the merits of her cause of action to the satisfaction of this Court which ruled that Miss Winter's rights were violated and remanded for trial. Winters v. Miller, supra.

In every case cited in the answering briefs on this point, the party seeking relief had not made a previous showing of a meritorious claim or defense and the lack of merit was obvious, Beshar v. Weinzapfel, 474 F.2d 127 (7th Cir. 1973); Design and Development, Inc. v. Vibromatic Mfg., Inc., 58 F.R.D. 71 (E.D. Pa. 1973); Altman v. Connolly, 456 F. 2d 1114 (2d Cir. 1972); or it failed to satisfactorily demonstrate mistake, inadvertance or excusable neglect, Universal Film Exchanges, In.., v. Lust, 479 F.2d 573 (4th Cir. 1973); Redac Project 6426, Inc. v. Allstate Insurance Co., 412 F.2d

1043 (2d Cir. 1969); or failed to explain its delay in seeking relief under Rule 60(b), Central Operating Co. v. Utility Workers of America, AFL-CIO, 491 F.2d 245 (4th Cir. 1974); or made its motion under Rule 60(b) in the wrong court, Bankers Mortgage Co. v. United States, 423 F.2d 73 (5th Cir. 1970) cert denied, 399 U.S. 927 (1971). Certainly, a party seeking relief under FRCP Rule 60(b)(1) is not required to prove his case in advance of trial or disprove every affirmative defense. Horn v. Itelectron Corp., 294 F. Supp. 1153 1155 (S.D.N.Y. 1958); see also: 11 Wright & Miller, Federal Practice and Procedure, §2857 at P. 160.

Rule 60(b) should be liberally construed in favor of reopening, and even greater liberality is intended when judgment is granted on default, or for failure to prosecute, rather than after a full trial on the merits. 11 Wright & Miller, Federal Practice and Procedure, §§2852, 2857. Indeed, it is an abuse of discretion, reviewable by this Court, for a district court to refuse to reopen a judgment entered on default or for failure to prosecute when mistake, inadvertance or excusable neglect is clearly demonstrated by the party seeking relief and the other party has suffered no prejudice thereby. Torres v. S.S. Pierce, 471 F.2d 473 (9th Cir. 1973); Bibeau v. Northeast Airlines, Inc.,

429 F.2d 212 (D.C. Cir. 1970); Tolson v. Hodge, 411 F.2d 123 (4th Cir. 1969); Negron v. Peninsular Navigation Corp., 279 F.2d 859 (2d Cir. 1960); Russell v. Cunningham, 279 F.2d 797 (9th Cir. 1960).

Spann v. Commissioner of District of Columbia, 443 F.2d 715 (D.C. Cir. 1970) (per curiam) presents a case which is remarkably similar to the one at bar. The plaintiff moved to reopen the case under Rule 60(b) after the tort action had been dismissed as to all parties under an abortive settlement effort. The motions were granted as to one defendant but denied as to the other two defendants. The Court of Appeals considered the rationale for the district court's decision and remanded to the district court for reconsideration.

In Spann, the record was devoid of any explana- of the grounds on which the district court acted, and no motion to dismiss, or for summary judgment, had been made on behalf of any defendant. The Court of Appeals noted that:

> The District Judge apparently considered that justice required him to reinstate appellant's case... (If so), we do not understand why the District Court did not reinstate the case as against all three original defendants. (443 F.2d at 716-717)

Although there was some indication that the district court was, in fact, adjudicating the District of Columbia's affirmative defenses, the Court of Appeals held that the

district court was not justified in adjudicating these defenses unless it believed that plaintiff's action against the District of Columbia was entirely frivolous. They could not be adjudicated otherwise,

> because until the motion to reinstate the action was granted, appellants were not in court again against the District of Columbia. And, as pointed out above, the defendant District of Columbia had never made any motion which would have served as a pretext for dismissal of the action as to it, or for entry of judgment in its favor. (443 F.2d at 717).

In the case before this Court, the defendants did not oppose the motion to reopen, they made no motion to dismiss or for summary judgment, and Judge Judd gave no indication of the grounds for his decision. The district court's order similarly lacks a rational basis and should be reversed as an abuse of discretion.

II. LIABILITY OF DR. MILLER

The issue of Dr. Miller's liability could not have been properly considered by the district court prior to trial, at least without new conclusively exculpatory evidence, in view of this Court's prior order of a trial on the merits. Winters v. Miller, 446 F. 2d 65, 71, 72 (2d Cir. 1971) cert denied, 404 U.S. 984 (1971). Moreover, the question of immunity was already rejected by Judge Travia (306 F. Supp. 1158, 1163 (E.D.N.Y. 1969)), actually considered and rejected at least once by this Court (446 F.2d at 72; Moore, J., dissenting) and should be laid to rest as the law of the case. Wharton v. Hirsch, 348 F.2d 906, 907 (2d Cir. 1965), Dale v. Hahn, 486 F.2d 76, 81 (2d Cir. 1973), cert denied, 43 U.S.L.W. 3208.

With respect to whether Dr. Miller can be held liable here, this case appears to follow directly from Dale v. Hahn, supra. The attempts in both answering briefs to distinguish Dale are telling. The State's brief cites this Court's opinion in Dale v. Hahn, 440 F.2d 633, 638 (2d Cir. 1971) ("Dale I") for the proposition that Dr. Miller's liability to Mrs. Dale was limited to the extent that he expended plaintiff's assets (State's brief, p. 11). The City's brief refers to this Court's denial of rehearing following "Dale I,"

to suggest that Dr. Miller's liability was based only on his connection to the appointment of Mrs. Dale's successor committee (City's brief, p. 16).

Neither brief follows Dale to its conclusion. They ignore Judge Knapp's decision upon remand in Dale, and its subsequent review by this Court and the Supreme Court. Dr. Miller was ultimately held liable to Mrs. Dale for the money spent by both committees, notwithstanding that none of the money was expended by Dr. Miller or the Department of Mental Hygiene and notwithstanding that, as it turned out, Dr. Miller had no personal knowledge of Mrs. Dale or the appointment of either committee. Dale v. Hahn, 486 F.2d 76 (2d Cir. 1973), ("Dale II"), cert denied sub nom. Miller v. Dale, 43 U.S.L.W. 3208.

As he does here (State's brief, p. 13), Dr. Miller argued incorrectly upon rehearing after Dale II that imposition of liability would conflict with Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1970) and Johnson v. Glick, 481 F.2d 1028, 1034 (2d Cir. 1973). ("Petition for Rehearing En Banc" and "Memorandum for Defendants-Appellants Upon Rehearing," Dale v. Hahn, 2d Cir. Docket Nos. 73-1795, 73-1934.) As in Dale, there is no conflict.

Sostre and Glick condition damage awards upon a showing of some personal responsibility of the defendant. In Sostre, the majority of the panel found non-liability

in a case of a successor prison warden. The warden not only had nothing to do with the deprivations complained of by the plaintiff there, but the Court found no reasonable basis for finding that he had the power or responsibility to take appropriate steps to protect the rights of the plaintiff prisoner.

In Glick, the plaintiff alleged a single assault upon him by a detention house officer. The warden defendant there did not participate in or authorize the assault. In addition, there were no facts in the knowledge of the warden requiring or justifying action by him to prevent the assault claimed to have occurred. The Court made it clear, however, that "a showing of some personal responsibility" (481 F.2d at 1034) does not require a showing that the defendant personally committed or ordered the unconstitutional act. To the contrary, if the act was "foreseeable" by the defendant, if the defendant had the power to prevent such acts but did nothing to prevent them from occuring, he may be held personally liable under 42 U.S.C. §1983.

In Glick, for example, the majority relied upon Wright v. McMann, 460 F.2d 126 (2d Cir. 1971), cert denied, 409 U.S. 885 (1972), decided after Sostre. In Wright v. McMann, Judge Lumbard, writing for the majority, affirmed a damage award against a prison warden for acts (placing prisoners in a substandard

"strip cell") which the warden did not personally commit or order. It was enough, ruled Judge Lumbard, that the warden must have known that the strip cell conditions were substandard. Furthermore, even if he did not know, "he was charged with having such knowledge" and "responsibility for permitting such conditions to exist was ultimately, in any event, squarely his" (460 F.2d at 134-135).

In Dale, the plaintiff prevailed on the argument that Dr. Miller's liability rested on the fact that he was personally responsible for the lawful administration of all state hospitals for the mentally ill, and could have promulgated regulations giving patients the right to adequate notice and hearing. ("Memorandum for Plaintiff-Appellee-Cross-Appellant Upon Rehearing," Dale v. Hahn, 2d Cir. Docket Nos. 73-1795, 73-1934.)

Likewise, in the present case, plaintiff Miriam Winters is not seeking to "subject an agency head to personal liability merely because of his status" or under a theory of respondeat superior (State's brief, pp. 9, 13). Dr. Miller, as Commissioner of Mental Hygiene, should have known that patients who were, had been or would be hospitalized in a hospital under his supervision and control, had professed religious objections to medication and other physical treatments. Although clothed with the power and duty to do so, he failed and

and neglected to promulgate rules and regulations guaranteeing the religious freedom of Miss Winters and others like her. In addition, he failed to train and instruct subordinates to respect their religious beliefs. By his silence and inaction, Dr. Miller tacitly authorized and condoned the forced medication of patients who object on religious grounds, and permitted subordinates to administer medication in disregard of the patients' religious objection.

In a case such as Johnson v. Glick, supra, a police officer on prison guard who commits brutality clearly does so on his authority and against the institutional policy. Here, however, the defendants have contended all along that the continuous forcible medication of Miss Winters was a matter of sound institutional policy (306 F. Supp. 1158; 446 F.2d 65, 68-71). Now that this Court has already repudiated that policy, Miss Winters should at very least have an opportunity to prove her case against an individual who had direct responsibility for policy in this area of fundamental First Amendment rights.

III. LIABILITY OF DR. OLLINS

The City's brief admits that, "on May 7, 1968, Doctors Sandra Grant and Gerald Ollins[5/] completed their examination of appellant and issued a two physician's certificate pursuant to Mental Hygiene Law §72, certifying that plaintiff was mentally ill..." (pp. 6-7). It also admits that Miss Winters "was given medication consisting of tranquilizers (both orally and intramuscularly), continually from the time of her admission" to Bellevue until May 13, 1968, when she was transferred to Central Islip State Hospital (p. 6) (emphasis added). This directly contradicts, therefore, their attempt to deny that Dr. Ollins came into contact with Miriam Winters during the period that she was being forcibly medicated (p.11).

It is absurd to suggest, as does the City's brief, that the hospital record listing Dr. Ollins's name once in connection with his examination of Miss Winters, establishes or proves that he "took no part in prescribing or condoning the specific treatment accorded appellant, or even knew of the medication she was given" (City's brief pp. 11-12). There has as yet been no trial or testimony by Dr. Ollins, but it is unlikely, as an examining physician with access to her chart, that he was ignorant of the medication

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5/ Dr. Ollins was the only defendant staff physician dismissed by the district court.

administered to Miss Winters.

One cannot pretend that the hospital record contains every detail of Miss Winter's experience at Bellevue, and there is uncontradicted evidence at least connecting Dr. Ollins with Miss Winters. It might develop, for example, that there was oral communication not recorded in the hospital records. Or, it might develop that Dr. Ollins was in a position as examining physician to be aware of Miss Winter's predicament, and to take steps which would have prevented further medication from being forced upon her. It is ever possible that Miss Winters might identify Dr. Ollins as one of the doctors who ordered or administered medication to her. The district court had no factual record before it on this question other than the hospital records. Certainly, in advance of trial, none of these possibilities can reasonably be dismissed as frivolous.

CONCLUSION

The Order of the district court which refused to reopen the action as to appellees Miller, Thomas and Ollins should be reversed and the case remanded for trial on the merits.

Dated: New York, New York
May 5, 1975

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MIRIAM WINTERS, Plaintiff, -against- ALAN D. MILLER, M.D., individually and as Commissioner of Mental Hygiene of the State of New York; ALEXANDER THOMAS, M.D., individually and as Director of the Psychiatric Division, Bellevue Hospital Center, et al., Defendants.	AFFIDAVIT OF SERVICE BY MAIL Index No. 75-7121

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

LAURA VILLAFANE, being duly sworn, deposes and says:

Deponent is not a party to the above action, is over 18 years of age and resides at 316 West 94th Street, New York, N.Y.

That on the 6th day of May, 1975, deponent served the within REPLY BRIEF FOR APPELLANT

upon LOUIS J. LEFKOWITZ, Attorney General of the State of New York, 2 World Trade Center, New York, New York; and W. BERNARD RICHLAND, Corporation Counsel of the City of New York, Municipal Building, New York, New York
the address designated by said attorney for that purpose by depositing a true copy of same in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

Laura Villafane
Laura Villafane

Sworn to before me this
6th day of May 1975.

Angelina Mitchell

ANGELINA MITCHELL
Notary Public, State of New York
No. 31-2731265
Qualified in New York County
Commission Expires March 30, 1977